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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE JAMES R. HOLLOWAY,
Petitioner

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

1. The government concedes (Br. in Opp. 8) that willfulness is an essential element of criminal contempt, and that the court of appeals relied on conduct that was not cited by the district court in the certificate of contempt to conclude that the cited conduct was willful. *See* Pet. App. 9a ("We

need not . . . rest on the cited colloquy alone").[1/] The government also acknowledges the established principle that "a reviewing court cannot uphold an order of contempt based on other, uncited conduct in which the contemnor engaged during the trial." Br. in Opp. 8. *See*, *e.g.*, *Tauber* v. *Gordon*, 350 F.2d 843, 845 (3d Cir. 1965) (*en banc*). The government contends (Br. in Opp. 9), however, that it is proper for an appellate court to consider uncited conduct to determine whether the cited conduct was willful. In support of this contention, the government asserts, without citing any authority, that a contempt certificate is like an indictment: "while the charging instrument must allege the conduct constituting the crime, it need not recite all of the evidence bearing on intent." *Id.*

The government's analogy is badly flawed. The basic purpose of an indictment is to give the defendant notice of the charges that he must defend against at trial. A contempt certificate, unlike an indictment, is not merely a "charging instrument." It is a *convicting* instrument. Because a defendant summarily convicted of criminal contempt has been deprived of a trial, the factual recitation in the certificate is the functional equivalent of the trial record.

The flaw in the government's analysis is underscored by examining the procedures available to a criminal defendant to challenge evidence of intent at trial — procedures that are unavailable in the summary contempt context. If the

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[1/] Contrary to the government's suggestion (Br. in Opp. 10 n.9), the conduct described in the contempt certificate was not sufficient to establish that petitioner acted willfully. *See* Pet. App. 39a-41a. In any event, not one of the three judges below was prepared to rely solely on the cited conduct. The question presented by the petition is whether it was appropriate for the court of appeals to comb through the record in search of additional evidence of willfulness.

prosecution seeks to admit evidence of intent at trial, the defendant has an opportunity to object, cross-examine the government's witnesses, present evidence of his own, and ultimately seek review of the trial court's evidentiary rulings. Petitioner, unlike a defendant in a criminal trial, had no notice that the court of appeals would consider incidents outside the scope of the contempt certificate, no opportunity to present evidence of his own concerning those incidents, and no right to judicial review of the appellate court's action.[2/]

In asserting that the court of appeals' decision does not conflict with decisions such as *Tauber*, the government simply ignores the fact that the court of appeals, under the guise of determining whether the cited conduct was willful, engaged in precisely the same "culling from the record [of] . . . all of the episodes of questionable conduct" that *Tauber* condemned. 350 F.2d at 845. Similarly, in asserting that the decision below does not violate the Due Process Clause or conflict with *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974) (per curiam), the government ignores this Court's ruling in *Eaton* that "the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty." *Id.* at 698 (emphasis in original). Because the court of appeals affirmed petitioner's conviction based on its own view of what a reasonable factfinder would have done, "the wrong entity judged the defendant guilty." *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2082 (1993).

[2/] Under Fed. R. Evid. 404(b), evidence of other wrongs is sometimes admissible at trial to show intent, but only if, upon request, the prosecution "provide[s] reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." In the summary contempt context, of course, the defendant is not even afforded a trial, let alone advance notice of the evidence of other wrongs that the reviewing court may decide to consider at the appellate stage.

The court of appeals' failure to limit its review to the facts known to have been considered by the district court is not merely an abstract or theoretical violation of due process:

> A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor . . . . Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record.

In re Little, 404 U.S. 553, 556 (1972) (Burger, C.J., concurring). The trial judge may well have omitted reference to certain conduct in the contempt certificate because she believed, based on additional information not reflected in the transcript, that the uncited conduct did not support a finding of willfulness. In addition, petitioner had no notice or opportunity to present to the factfinder his version of the uncited conduct. The court of appeals' procedure thus compounds the deprivation of basic constitutional rights that attends summary contempt convictions.

In sum, the government's effort to defend the court of appeals' procedure is unpersuasive in light of the well-established principles that summary convictions for contempt are "always, and rightly, . . . regarded with disfavor," *Sacher* v. *United States*, 343 U.S. 1 (1952), and that "the procedural requirements of Rule 42(a) must be strictly observed," see Pet. 9 (citing authorities). Further review is warranted to reconcile the court of appeals' decision with cases such as *Eaton* and *Tauber*.[3/]

[3/] The government asserts (Br. in Opp. 8) that courts of appeals reviewing summary contempt convictions "routinely" consider the entire trial record in evaluating whether a defendant's actions were willful. In

(continued...)

2. The government asserts (Br. in Opp. 13) that the decision to employ the summary procedures of Rule 42(a) "rests in the discretion of the district court" (citations omitted). That is so only if the strict requirements for applying Rule 42(a) are met — including an actual obstruction of justice and summary (*i.e.*, immediate) imposition of punishment. Where those requirements are *not* met, a district court has no discretion to employ Rule 42(a), as demonstrated by the many decisions reversing summary contempt convictions without deferring to the trial court. *See*, *e.g.*, *Harris* v. *United States*, 382 U.S. 162 (1965); *In re McConnell*, 370 U.S. 230 (1962); *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984).

a. The government does not contend that Rule 42(a) is available absent an actual obstruction of justice, and it acknowledges that decisions such as *In re McConnell*, 370 U.S. at 234, and *Taberer* v. *Armstrong World Indus., Inc.*, 954 F.2d 888, 901 (3d Cir. 1992), so hold. *See* Br. in Opp. 15 & n.12. The government's sole argument is that "the court of appeals found such an interference or obstruction in this

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[3/](...continued)
support of that assertion, however, the government cites only three cases — none of which in fact supports the government. In *United States* v. *Lumumba*, 794 F.2d 806 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986), the court was reviewing a *non*-summary contempt conviction following a hearing under Fed. R. Crim. P. 42(b) at which the entire trial transcript was admitted into evidence. The defendant in *Lumumba*, unlike petitioner, had an opportunity to object to the admission of evidence, cross-examine government witnesses, and present evidence in his own behalf. There was no possible due process violation in *Vaughn* v. *City of Flint*, 752 F.2d 1160, 1169 (6th Cir. 1985), or *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973), because the courts of appeals in those cases *reversed* summary contempt convictions (and did so without considering whether it was appropriate for a reviewing court to consider evidence outside the contempt certificate).

case." Br. in Opp. 15. That argument is refuted by a reading of the majority and dissenting opinions.

Chief Judge Mikva's dissenting opinion argued at length that petitioner did not obstruct justice. Pet. App. 37a-38a. The dissent observed that "a court's summary contempt power should be invoked only as a last resort," and that "[w]here obstruction of justice is not imminent, the court is bound to follow the 'normal procedure' articulated in Rule 42(b), which calls for disposition only after notice and hearing." Pet. App. 37a. Chief Judge Mikva concluded that "[t]he circumstances described in the contempt certificate do not warrant a summary contempt conviction" under Rule 42(a). Pet. App. 35a. The majority cited this discussion and dismissed it with the comment that the cases discussed in the dissenting opinion (including *In re McConnell*) "are, insofar as they clarify the meaning of the obstruction of justice element of § 401(1), not pertinent to this opinion." Pet. App. 3a n.1. The issue, however, is not whether the elements of Section 401(1) have been proved, but whether the use of the summary contempt power was improper. In concluding that the district court properly employed the Rule 42(a) procedures, the majority did not consider, let alone decide, whether petitioner actually obstructed justice. Pet. App. 12a-14a.

The government points to the court of appeals' statement that "[b]y the time Judge Johnson moved under Rule 42(a), she had a compelling need to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom." Br. in Opp. 15 (quoting Pet. App. 13a). The government argues that this is "the essence" of an actual obstruction of justice. *Id.* That is not so. *Any* intentional violation of a court order creates a "need to . . . deter future intentional violations" and "vindicate judicial authority." But

it does not follow that all violations of court orders amount to an obstruction of justice. As Chief Judge Mikva pointed out, an incident that "covers two pages of the transcript and probably consumed less than a minute" simply does not rise to the level of an actual obstruction of justice. Pet. App. 37a.[4/]

b. In the petition, we pointed out that Rule 42(a) provides that "[a] criminal contempt may be punished summarily" in specified circumstances, and that the ordinary meaning of "summary" punishment is punishment "done or occurring without delay." Pet. 16 (quoting *Webster's Third New International Dictionary* 2289 (1968)). The government does not even address the plain language of Rule 42(a), nor does it cite any authority for its contention that it was appropriate to delay the imposition of punishment until five months after petitioner was held in contempt.

Moreover, the government's effort to distinguish the Second Circuit's decision in *United States* v. *Lumumba*, 741 F.2d 12, is wholly unconvincing. *See* Br. in Opp. 17. To be sure, the trial court in *Lumumba* deferred both sentencing *and* a final adjudication of the contempt charge until after trial. But the court's decision clearly did not turn on that factual difference. Instead, the Second Circuit rested its decision squarely on the impermissible delay in *punishment*:

[4/] In view of the government's apparent agreement with petitioner's legal argument, if the Court were to conclude that the other issues presented do not warrant further review, petitioner believes that it would be appropriate to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand this case for further consideration in light of *In re McConnell*, 370 U.S. at 234 ("before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice").

> [The trial judge] could have sentenced Lumumba on the spot if circumstances warranted such immediate action . . . . Yet, apparently he believed that such was unnecessary and, wishing to avoid the potential disruption of the trial and prejudice to the defendant that would have followed from Lumumba's immediate incarceration, postponed the ultimate disposition. . . . Where punishment is deferred until another day, the reason for the exception that denied due process disappears.

741 F.2d at 15, 16. *See also United States* v. *Stratton*, 779 F.2d 820, 836 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986) (emphasis added) ("where *punishment* is deferred until after trial, summary procedure may not be used"). Because petitioner would have been entitled to a Rule 42(b) hearing in the Second Circuit, this question also warrants review.[5/]

[5/] The Public Defender Service and the National Legal Aid and Defender Association have filed a brief as *amici curiae* in support of petitioner. The *amici* argue that when a trial judge summarily convicts a lawyer of contempt but defers sentencing until after the trial, the lawyer's interest in conciliating the judge conflicts with his duty to represent his client zealously. The government's suggestion (Br. in Opp. 16 n.13) that petitioner would have suffered an even greater "chill" if sentence had been imposed immediately defies common sense. A lawyer has much less to fear once the trial court has imposed sentence. And even if the lawyer holds out some hope that the judge may reduce the sentence, he will recognize that arguing after sentence has been imposed "is akin to closing the barn door after the horse has escaped." *United States* v. *Lumumba*, 741 F.2d at 17.

CONCLUSION

For the foregoing reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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